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80998-4

NO. 80998-4

SUPREME COURT OF THE STATE OF WASHINGTON

Allan Parmelee

Petitioner,

v.

Eric Burt, et al., and
Washington State Department of Corrections,

Co-Respondents.

RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO PETITION FOR DISCRETIONARY REVIEW

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I. RESPONDENT

The Respondent is the State of Washington Department of Corrections (DOC).

II. DECISION BELOW

The decision below is a published opinion issued by the Court of Appeals, Division II, on October 6, 2007. It is attached as an appendix to the Petition for Discretionary Review.

III. ISSUES FOR REVIEW

The following are the issues that this Court would consider if review were accepted:

1. Eleven of the pro se Washington State Penitentiary (WSP) staff members signed the original complaint to enjoin Petitioner Allan Parmelee's public records request and four additional pro se staff members signed the amended complaint adding them as parties. As a threshold matter, did the Court of Appeals properly examine this issue when Parmelee raised it for the first time on appeal? Did the Court of Appeals correctly rule that CR 11 favors substance over form and that the pleadings were sufficient?

2. The Petitioner was aware that the WSP staff members which were the subject of his public records request would seek to enjoin their disclosure in Superior Court over three months before the hearing

was held, yet he waited until more than three weeks after the written order was entered to seek to intervene in the matter pursuant to CR 24. Did the trial court abuse it discretion in finding the motion to intervene was untimely?

3. Petitioner did not provide authorities or argument that he was an indispensible party pursuant to CR 19 as a part of this motion to the trial court. Nevertheless, the Court of Appeals found the issue had been preserved. As a threshold matter, is the issue preserved for appeal? If yes, did the Court of Appeals correctly rule that the Petitioner was not necessary for a just adjudication of the pro se staff members' motion to enjoin disclosure?

IV. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

This case involves the routine interpretation of several rules of Civil Procedure. First, the Court of Appeals analyzed CR 11 as applied to the sufficiency of the pleadings filed by the fifteen pro se WSP staff members who sought to enjoin disclosure of records sought by the Petitioner, here, inmate Allan Parmelee. Parmelee claimed there was no address on the pro se pleadings as required by CR 11 and that only eleven staff members signed the original complaint and the additional four staff members only signed the amended complaint.

The trial court made no ruling under CR 11 as there was no motion to strike the pleadings (and thus no opportunity to correct any pleadings). When Parmelee raised this on appeal, DOC argued that the sufficiency of the pleadings was not jurisdictional and since it was raised for the first time on appeal, the issue should not be considered. The Court of Appeals addressed the issue and ruled that CR 11 favors substance over form, therefore, the pleadings were sufficient.

The second rule analyzed by the Court of Appeals was CR 24(a), intervention as a matter of right. Parmelee had waited until over three weeks after the trial court had entered its written order granting the staff members' motion to enjoin disclosure to seek to intervene. He had been notified over three months before the hearing about the motion. The trial court ruled that Parmelee's motion to intervene was untimely and the Court of Appeals agreed that there was no abuse of discretion.

Finally, the Court of Appeals analyzed CR 19, Indispensable Parties. DOC had contended that Parmelee never mentioned CR 19 in his motion to intervene and provided no argument or authorities why he was one, he merely used the term in the caption of his motion to intervene. Therefore, the argument was impermissibly raised for the first time on appeal. The Court of Appeals found the mere caption reference to be

sufficient to preserve the issue. It then ruled that under the totality of the circumstances, Parmelee did not qualify as an indispensable party.

B. FACTUAL BACKGROUND

1. Parties

Petitioner Allan Parmelee was incarcerated WSP in Walla Walla, Washington, when the events occurred that are the subject of this appeal. Parmelee made a public disclosure request to DOC for information relating to 15 staff members at WSP who are the Co-Respondents in this matter, Cliff Pease, Cheri Sterlin, John Moore, Joann Irwin, Gary Edwards, Laura Coleman, Richard "Jason" Morgan, Charles Crow, David Snell, Sherry Hartford, Paul-David Winters, Alan Walter, Dustin West, Hal Snively and Eric Burt, hereinafter, the staff members. CP 28-29. On January 26, 2005, the staff members filed a complaint seeking to enjoin DOC from disclosing the information sought by Parmelee pursuant to the process outlined in RCW 42.56.540. CP 1-6; 7-12.

2. Background

On October 6, 2004, Parmelee was charged with a violation of prison disciplinary rules for threatening and intimidating a staff person, one of the staff members herein, Dave Snell. CP 85-90. Mr. Snell was the grievance coordinator at WSP and had apparently resolved a grievance filed by Parmelee to his dissatisfaction. Parmelee wrote two letters to Mr.

Snell threatening to sue him over this incident. CP 93-94. In the latter letter, Parmelee threatened to have a "released prisoner" serve him with the lawsuit "at home, usually late at night" or that he would have Mr. Snell followed and served at a time that "would or could be most embarrassing" to him. CP 94.

The day after being charged with this infraction, October 7, 2004, Parmelee made a public disclosure request to Megan Murray, the public disclosure coordinator for WSP. CP 28-29. In it, Parmelee asked for a photograph of Mr. Snell and 11 other WSP staff members, as well as "employment, income, retirement, expense, and/or disability type document(s)" and any administrative grievance or internal investigation of the staff members. *Id.* Ms. Murray timely responded to Parmelee's request seeking clarification. CP 35-36.

On December 5, 2004, Parmelee was again infracted for threatening and intimidating staff. CP 101. This infraction arose when Parmelee addressed a letter to an individual by the name of Barry Powell and asked Mr. Powell to obtain home address information "on a couple of pigs here." Parmelee sought the home addresses of three of the staff members herein, Dave Snell, Eric Burt and Charles Crow. *Id.* Parmelee sought these addresses so he could have "a couple big, ugly dudes to come

to Walla Walla for some late night service on these punks. Obviously, a show of some muscle needs to be sent." *Id.*

On December 22, 2004, Ms. Murray wrote Parmelee and informed him that the staff members who were the subject of his disclosure request would seek to enjoin disclosure pursuant to RCW 42.17.330, since recodified as RCW 42.56.540. CP 499. Ms. Murray wrote that "[t]he documents will not be disclosed until a hearing date is scheduled and a decision made by Walla Walla Superior Court as to whether the Department shall or shall not disclose the documents." *Id.* (emphasis added). Thus, Parmelee was aware on December 22, 2004, that an action to enjoin disclosure would be filed and in which court. Ms. Murray wrote Parmelee again on December 29, 2004, reiterating this information and also advising him that certain other records that he had requested were ready for disclosure upon payment of copying and postage expenses. CP 268. At this time Parmelee took no steps toward participation in the action.

On February 1, 2005, Ms. Murray wrote Parmelee and informed him that the hearing date had been set for February 22, 2005. CP 500. Again, Parmelee took no steps to intervene or otherwise participate in the action at this time.

On February 22, 2005, the judge assigned to hear the matter recused himself and the matter was re-assigned to the Honorable Robert L. Zagelow, who re-set the hearing for February 28, 2006. CP 324. On that date, Judge Zagelow did not rule but requested additional briefing on the issue of enjoinment from DOC. *Id.* That briefing was provided to Judge Zagelow on March 15, 2005. CP 12-19. The next day, Judge Zagelow entered an order granting the staff members' motion to enjoin DOC from disclosing the documents requested by Parmelee. CP 110-114.

On April 7, 2005, Parmelee filed a Limited Notice of Appearance, CP 123, and a Motion to Intervene, CP 124-195, and a Motion to Reconsider. CP 196-215. At this time, he claimed he should be allowed to intervene, falsely asserting he had never been given notice of the action between the staff members and DOC. CP 124. DOC pointed out that Parmelee had been kept apprised that there was litigation over his disclosure request and objected to the motion as untimely. CP 316-322.

On May 11, 2005, Judge Zagelow issued a letter opinion. Concerning the notice issue, Judge Zagelow wrote "it is undisputed that he [Mr. Parmelee] had actual knowledge that litigation had been commenced in Walla Walla County Superior Court" on December 22, 2004. Judge Zagelow concluded that Parmelee had presented no exceptional circumstances to justify his delay in seeking to intervene. CP 324.

Pointedly, Judge Zagelow noted, "[i]ndeed, it is clear from his supporting documents that Parmelee is fully aware of how to participate in legal proceedings of all kinds, and there is no explanation as to why he failed to do so in this instance."[1] *Id.*

On June 7, 2005, the order was entered by Judge Zagelow denying Parmelee's Motion to Intervene. CP 483-484. On June 30, 2005, Parmelee filed a Notice of Appeal of the June 7, 2005, order. CP 493-495.

V. REASONS WHY REVIEW SHOULD BE DENIED

Petitions for review are considered under the criteria of RAP 13.4(b). Those criteria include: the decision of the Court of Appeals is in conflict with either a decision by the Supreme Court or in conflict with another division of the Court of Appeals; the decision by the Court of Appeals raises a significant question of law under the Constitution of either Washington or the United States; or the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Parmelee concedes that the decision of the Court of Appeals, here, does not conflict with either a decision by the Supreme Court or with another division of the Court of Appeals as he makes no such arguments.

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[1] Parmelee even acknowledged the extent of his legal experience in his Declaration in Support of his Motion to Intervene, claiming he had "litigated in both state and federal court" and had "prevailed in many such cases I have litigated." CP 217.

Additionally, while all litigation involving interpretation of court rules implicates some public interest, the criteria of RAP 13.4(b)(4) requires that it present an issue of substantial public interest that "should be determined by the Supreme Court." RAP 13.4(b)(4). The rule shows that review is warranted where there is a need for clarification of a final decision by this Court. As the Court of Appeals' decision presents no conflict with existing case law and reflects the facts of this particular case, the Petition does not meet the criteria for granting review.

A. IT IS NOT IN THE PUBLIC INTEREST TO BAR PRO SE LITIGANTS FROM COURT ON TECHNICALITIES IN THE PLEADINGS

Apparently Parmelee is abandoning his argument about the lack of an address on the staff members' pleadings as he does not address this issue in the Petition. Rather, he focuses on the issue of their signatures not all appearing on each pleading. Whereas CR 11 requires pro se parties to sign pleadings as well as attorneys, the purpose for the requirement is for the party to certify that the pleading has been read and, to the best of the party's knowledge and belief, after reasonable inquiry, the pleading is well grounded in fact, is warranted by existing law and is not interposed for any improper purpose. CR 11(a).

As noted by the Court of Appeals, 11 staff members signed the original complaint and the four additional staff members signed the

amended complaint. The amended complaint was identical to the original complaint except for the addition of the four new staff members, therefore, all 15 certified that the complaint was grounded in fact, warranted by existing law and not interposed for an improper purpose.

Further, the Court of Appeals noted that DOC had not objected to the staff members' pleadings not containing all of their signatures. Parmelee's argument therefore devolves to an assertion that "there is no record that all the parties so stipulated." Petition, p. 9. However, the proper remedy for irregularities in the pleadings is a motion to strike. *Greene v. Union Pacific Stages, Inc.*, 182 Wash. 143, 145, 45 P.2d 611 (1935). As DOC did not move to strike, it obviously acquiesced in the procedure used by the staff members. In the absence of any issue at the superior court, the staff members could not have even fixed the allegedly inadequate verification.

The alleged lack of verification would only be relevant if it deprived the court of jurisdiction. However, this Court has determined that it does not. *Griffith v. Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996). In *Griffith*, several neighboring property owners failed to verify a writ challenging a decision by the city of Bellevue to rezone a parcel of land. *Griffith*, 130 Wn.2d at 191. The superior court granted a motion to dismiss for lack of subject matter jurisdiction. *Id.* at 191-92.

This Court held that CR 11 determined whether a matter should be dismissed for lack of a signature. *Id.* at 194. The purpose of the civil rules, the court noted, was to place substance over form and to resolve cases on the merits. *Id.* at 192.

> "[T]he basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized . . . as 'the sporting theory of justice.'" Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.

Id. (quoting *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974)). Based on this "we hold a signed verification is not a jurisdictional requirement." *Id.*

Parmelee argues that this Court should take review because this issue "potentially affects the general judicial process." Petition, p. 10, citing *State v. Watson,* 155 Wn.2d 574, 122 P.3d 903 (2005). However, the issue in *Watson* was not verification of a civil compliant by pro se litigants, but ex parte communications with the court.

In *Watson*, the Pierce County Prosecuting Attorney issued a memorandum to all superior court judges and defense counsel that it would no longer recommend drug offender sentencing alternatives (DOSA). *Id.* at 575. The Court of Appeals concluded that the memorandum was an ex parte communication. *Id.*

This Court accepted review on the grounds there was a substantial public interest present. *Id.* at 577. However, the interest in question was that the Court of Appeals' decision "has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue." *Id.*

There are no "sweeping implications of the Court of Appeals decision" here as there was at issue in *Watson*. *Id.* at 578. Here, the facts upon which the Court of Appeals determined the pleadings were sufficient are unique to this case. Every other case where a similar issue arises is also going to be fact specific. Thus, there is no substantial public interest in this court accepting review to address CR 11.

B. IT IS FOR THE LEGISLATURE TO DETERMINE THE STATUS OF THE REQUESTOR IN AN ENJOINMENT ACTION, NOT THE COURTS.

On appeal, Parmelee argued that he was an indispensible party pursuant to CR 19(a). The Court of Appeals disagreed finding that the staff members still had the burden to overcome the presumption that the records in question were viewable by the public, and that the interest of any member of the public in making a public disclosure request, not just the Parmelee, was apparent to the trial court.

The statute that the staff members used to enjoin disclosure was RCW 42.56.540 which reads in pertinent part:

> The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

Here, the persons named in the record, the staff members, sought to enjoin DOC from disclosing a public record in its possession that pertained to them. Those are the two parties contemplated by the statute. The statute is silent as to what role, if any, the requestor of the record must play in the enjoinment action.

Parmelee asks this Court to evaluate if courts must compel inclusion of the requestor in any enjoinment action.[2] If the Legislature had intended the requestor to be an indispensible party in an action under RCW 42.56.540, it could easily have said so.

Parmelee claims "It is not in the public's interest to have an agency and its employees keep out interested parties, especially the original records requestor." Petition, p. 14. This misstates the case and the ruling

[2] "A clear statement from this Court that the PRA requires the inclusion of the requestor as a party in an injunction action will put lower courts in the best position to weigh these competing interests." Petition, p. 11.

below. There is a process by which requestors can become a party to an enjoinment action under the statute; intervention pursuant to CR 24(a).[3]

Parmelee thus had an undisputed right to seek intervention here under CR 24(a). This case simply held that he was untimely in his effort and had no reasonable excuses for the delay

There are four requirements to be satisfied before intervention may be allowed: (1) timely application for intervention; (2) an applicant claims an interest which is the subject of the action; (3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and (4) the applicant's interest is not adequately represented by the existing parties. *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994). All four of these requirements must be met to justify reversal. *Id.* at 303.

It is well established that"[t]imeliness is a critical requirement of CR 24(a)." *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989); *Martin v. Pickering*, 85 Wn.2d 241, 243, 533 P.2d 380 (1975).

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[3] *Tiberino v. Prosecuting Attorney*, 103 Wn. App. 680, 686-87, 13 P.3d 1104 (2000) (discharged employee of the Prosecutor's Office sought to enjoin disclosure to Spokane Television, Inc. of personal e-mails she sent during work hours. Spokane Television allowed to intervene prior to oral arguments); *Bellevue John Does 1-11 v. Bellevue School District #405*, 129 Wn. App. 832, 839, ¶¶ 2-4, 120 P.3d 616 (2003) (37 school teachers sought to enjoin disclosure to the Seattle Times of records maintained by school districts relating to accusations or investigations for sexual misconduct); *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 31-32, 769 P.2d 283 (1989) (Police Guild sought to enjoin release of Liquor Board report to Cowles Publishing about liquor license violations at Guild club. Cowles allowed to intervene).

Abuse of discretion is the proper standard of review for a trial court's determination of timeliness. *Kreidler*, 111 Wn.2d at 832. Abuse of discretion occurs when an order is manifestly unreasonable or based upon untenable grounds. *Washington State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). "A reviewing court will find abuse 'only when no reasonable person would take the position adopted by the trial court.'" *Id.*; *Board of Regents v. Seattle*, 108 Wn.2d 545, 557, 741 P.2d 11 (1987).[4]

Here, Parmelee had notice of the court action as early as December 22, 2004, yet he waited until 22 days after the Court entered its order to seek to intervene. As in *Kreidler*, Parmelee's Motion to Intervene was untimely and the court did not abuse its discretion in denying it.

The Court should not therefore accept review to hear Parmelee's argument that records requestors are indispensible parties under RCW 42.56.540. The argument was untimely and there is no conflict or disputes in the lower courts. Requestors already have an avenue to become party to such litigation; intervention. Parmelee in fact availed himself of this option, just not in a timely manner.

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[4] In *Kreidler*, this Court upheld the trial court's ruling rejecting several legislators who moved to intervene in a ballot title case seven days after the ruling on the title. "Petitioners had ample opportunity to intervene before the Superior Court made its decision, but they failed to do so. They had notice, were aware of the suit, and no extraordinary circumstances justify delay." *Id.* at 833.

C. PARMELEE WAS FAIRLY AND SUFFICIENTLY APPRISED OF THE PENDANCY OF THE STAFF MEMBERS' ENJOINMENT ACTION.

Parmelee contends that he did not have adequate notice of the enjoinment action between the staff members and DOC. He claims that "the agency must provide proper notice to the requestor which includes providing the caption and the case number." Petition, p. 19. No authority supports this contention.

Case law concerning the sufficiency of notice is well-settled. In a case cited by Parmelee, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), the U.S. Supreme Court decided that no specific method was required to give notice as long as the method is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. 339 U.S. at 314; *State v. Thomas*, 25 Wn. App. 770, 773, 610 P.2d 937 (1980). "In civil cases, the purpose of notice statutes is to fairly and sufficiently apprise those who may be affected of the nature and character of the action, and notice is deemed adequate in the absence of showing that anyone was actually misled by the notice." *Dept. of Natural Resources v. Marr*, 54 Wn. App. 589, 596, 774 P.2d 1260 (1989), citing *Nisqually Delta Assoc. v. DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985).

Not even the underinsured motorist case cited by Parmelee requires service of the caption of a complaint on the insurer when it's insured sues an uninsured tortfeasor. In *Lenzi v. Redland Insurance Co.*, 140 Wn.2d 267, 996 P.2d 603 (2000), the plaintiff was injured by an uninsured motorist and filed a claim with his insurance company, Redland, for underinsured motorist coverage. *Id.* at 270. The plaintiff and the insurance company could not reach a settlement and so the plaintiff obtained a default judgment against the at-fault motorist. *Id.* at 271-272. When the insurance company complained about notice, this Court held "[n]either the *Finney-Fisher* rule nor ordinary notions of fair play and substantial justice dictate the Lenzis had any duty to Redland other than timely notifying Redland of the filing of the summons and complaint." *Id.* at 276.

DOC timely notified Parmelee of the staff members enjoinment action by letter dated December 22, 2004. Parmelee took no action with this information. He could have asked Ms. Murray, the WSP disclosure coordinator, for the case information. He could have corresponded with the clerk of the superior court. Or, for that matter, he could have made a public records request for a copy of the complaint. As an experienced litigator, Parmelee was well aware of the avenues he could obtain the case caption information if he wanted.

DOC's letters fairly and sufficiently apprised Parmelee that the staff members were seeking to enjoin his public disclosure request in Walla Walla County Superior Court. Parmelee chose not to avail himself of this information to seek to intervene until over three weeks after the Court entered its order. The court did not abuse its discretion when it held that Parmelee had no good cause for his untimely efforts to intervene.

D. PARMELEE'S CLAIM FOR ATTORNEY'S FEES IS NOT APPROPRIATE FOR REVIEW BECAUSE THE ONLY ISSUE IS DENIAL OF HIS UNTIMELY MOTION TO INTERVENE.

Parmelee's last argument is that his claim for attorney's fees presents an issue worthy of this Court's review. He is wrong because the issues raised by Parmelee are procedural questions. Even if his issues are reviewed and decided in his favor, the Court would not reach the issues necessary for consideration of his attorney fee arguments.

Attorney fees are provided in the Public Records Act:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.56.550(4).

Here, the superior court's decision was limited to determining that Parmelee's motion to intervene was untimely and without a good excuse. The Court of Appeals' decision is similarly narrow, primarily determining

that the superior court did not abuse its discretion, and also rejecting his CR 11 and indispensible party theories.

Even assuming these decisions were reviewed by this Court, an attorney fees claim under RCW 42.56.550(4) would not be determined. A ruling on the denial of intervention, or a ruling about the pro se signatures and CR 11, would not be a determination of a "right to inspect or copy any public record". Intervention by Parmelee and remand would be necessary first. Only then would a superior court be in a position to determine if Parmelee has prevailed against the agency and determined his "right to inspect or copy any public record." To illustrate this point, the Court need only note that the briefing does not include arguments by Parmelee showing a right to specific records, or briefing by the plaintiff employees or DOC opposing Parmelee's arguments concerning the records themselves.

Parmelee's arguments for attorney's fees therefore cannot meet the criteria in RAP 13.4(b) because they would not be ripe. He shows no plausible basis for attorney fees awards based on prevailing at a procedural stage of a motion to intervene, or a CR 11 challenge to the Complaint.

VI. CONCLUSION

The only issues before this Court involve interpretation of the rules of civil procedure. Specifically, they are CR 11, regarding sufficiency of the pleadings, CR 19, Indispensible Parties, and CR 24, Intervention. Parmelee also claims insufficient notice of the staff members' enjoinment action.

Case law is well-settled for all issues, therefore, there is no conflict among the divisions of the Court of Appeals or the Supreme Court. Further, the interpretation of these rules do not present an issue of substantial public interest that need to be addressed again by this Court. As such, Parmelee's Petition does not meet the criteria for acceptance of review.

For the reasons outlined above, DOC respectfully requests that this Court deny the Petition for Discretionary Review.

DATED this 4th day of February, 2008.

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CERTIFICATE OF SERVICE

I certify that I served a copy of RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO PETITION FOR DISCRETIONARY REVIEW on all parties or their counsel of record on the date below as follows via U.S. Mail, Postage Prepaid,

TO:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 4th day of February, 2008, at Olympia, Washington.

Katrina Toal
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